FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 3 1947
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

---

# No. 225

---

BAKERY SALES DRIVERS LOCAL UNION NO. 33, An Unincorporated Association, and CHARLES M. ANDRE,

*Petitioners,*

*vs.*

A. WAGSHAL, Trading as "WAGSHAL'S DELICATESSEN,"

*Respondent*

---

## STATEMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

WILLIAM E. LEAHY,
*821 15th Street, N. W.,*
*Washington, D. C.;*
IRVING WILNER,
*Bond Building,*
*Washington, D. C.,*
*Counsel for Respondent.*

# INDEX

## Subject Index


| | Page |
|---|---|
| The question presented in the petition herein is a moot one | 2 |
| No error committed by the court below | 4 |
| Prayer | 7 |


## Table of Cases Cited


| | |
|---|---|
| *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617, 108 A. L. R. 1000 | 2 |
| *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 66 L. Ed. 189, 27 A. L. R. 360 | 4 |
| *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688 | 3 |
| *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558 | 2 |
| *Columbia River Packers Association, Inc.* v. *Hinton*, 315 U. S. 143, 86 L. Ed. 750 | 5 |
| *Converse* v. *Highway Construction Co.*, 107 F. (2d) 127, 127 A. L. R. 869 | 6 |
| *Milk Wagon Drivers Union* v. *Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63 | 5 |
| *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 82 L. Ed. 1012 | 5 |
| *Pennsylvania* v. *Wheeling, etc.*, 59 U. S. 421, 15 L. Ed. 435 | 4 |
| *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396 | 2 |
| *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 597, 36 A. L. R. 1310 | 4 |
| *St. Pierre* v. *United States*, 319 U. S. 41, 87 L. Ed. 1199 | 3 |
| *Texas Co.* v. *Brown*, 258 U. S. 466, 66 L. Ed. 721 | 4 |
| *United States* v. *Hutcheson*, 212 U. S. 219 | 6 |
| *Western Union Telegraph Co.* v. *International Brotherhood*, 133 F. (2d) 955 | 4 |

## Statutes Cited


| | Page |
|---|---|
| Constitution of the United States, Art. III, Section 2 | 2 |
| National Labor Relations Act as amended by the Labor Management Relations Act of June 23, 1947 (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151-166, Pub. No. 198, 74th Cong., as amended by Act of June 23, 1947, Pub. Law 101, 80th Cong.) | 3 |

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

## No. 225

BAKERY SALES DRIVERS LOCAL UNION NO. 33, An Unincorporated Association, and CHARLES M. ANDRE,

*Petitioners,*

*vs.*

A. WAGSHAL, Trading as "WAGSHAL'S DELICATESSEN,"

*Respondent*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*To the Honorable the Justices of the Supreme Court of the United States:*

The above named respondent respectfully submits that the petition for a writ of certiorari heretofore prayed for in this cause be denied. In urging the denial of said petition, respondent relies on the following grounds:

1. This Court should not entertain this petition for the reason that the questions therein presented are moot.

2. The Court below committed no error in affirming the decision of the District Court of the United States for the District of Columbia, overruling petitioners' motion to dismiss a complaint for injunction filed by respondent, and granting an injunction *pendente lite* against picketing and boycotting by petitioners. (Opinion of the United States Court of Appeals for the District of Columbia, No. 9121; Appendix A in the petition of the appellants.)

**The Question Presented in the Petition Herein Is a Moot One**

An appeal in an equity suit opens up the inquiry as to the correctness of the decision appealed from and its reversibility as of the time of the ultimate decision by the reviewing tribunal. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396; *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558.

By Art. III Section 2 of the U. S. Constitution, the Judicial power of the United States is limited to cases and controversies. In *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 81 L. Ed. 617, 108 A. L. R. 1000, this Court stated that a controversy, within the purview of the Constitution is such "that it must be a real and substantial controversy *admitting of specific relief through a decree of a specific character*, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

As far as the operation of the injunction herein, *pendente lite*, between the date of its rendition and the date of the ultimate disposition of the petition for the writ of certiorari in this cause is concerned, it cannot, as a practical matter, be affected by the action of this Court. Petitioners herein do not allege or claim any damages attributable to the effectiveness of the temporary injunction in the interim between the aforestated dates. To this extent, therefore, the petition

herein praying for a review of the judgment of the United States Court of Appeals for the District of Columbia entered in this cause April 28, 1947, presents nothing but a moot question pertaining to no existing controversy. Such a moot question, the United States Courts, including this Court, are without constitutional power to adjudicate. *St. Pierre* v. *U. S.*, 319 U. S. 41, 87 L. Ed. 1199 (1943) and cases there cited; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 80 L. Ed. 688, rehearing denied—297 U. S. 728, 80 L. Ed. 1011.

Insofar as the prospective operation of the injunction *pendente lite* in this cause is concerned, the question as to whether it continues to be valid for the purpose of restraining picketing and boycotting by the petitioners is likewise moot. This for the reason that the National Labor Relations Act as amended by the Labor Management Relations Act of June 23, 1947 Act of July 5, 1935 c. 372, 49 Stat. 449, 29 U. S. C. Sec. 151-166, Pub. No. 198, 74th Cong., as amended by Act of June 23, 1947, Pub. Law 101, 80th Cong.), effective August 23, 1947, in Sec. 8 (b) (4) (A), renders it a Union Unfair Labor Practice for a Union to require an employer not to handle or sell products of any other producer, processor or manufacturer, and provides further, in Sec. 10 (h) thereof that Courts not be limited in granting relief in enforcing orders of the Board, pursuant to Sec. (9) of that Act giving the Board power to enforce the provisions of Sec. (8), by the provisions of the Norris-LaGuardia Act. To the extent, therefore, that petitioners allege a "dispute" between them and the respondent concerning a sale by the latter of a certain non-union product as a ground for bringing this cause within the anti-injunction provisions of the Norris-LaGuardia Act, such a dispute can no longer, by virtue of the express provisions of the New Labor Management Relations Act of 1947, be treated as a labor dispute

rendering the United States District Court powerless to issue injunctive process.

Statutes passed subsequent to the date that the decree below was rendered, must be given effect in deciding an appeal where the case involved relief by injunction which operate only *in futuro*. *Texas Co.* v. *Brown*, 258 U. S. 466, 66, L. Ed. 721; *Pennsylvania* v. *Wheeling etc.*, 59 U. S. 421, 15 L. Ed. 435; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271, 144 N. E. 597, 36 A. L. R. 1310, error dismissed, 271 U. S. 649, 70 L. Ed. 1131. This principle has found recognition in labor cases. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 66 L. Ed. 189, 27 A. L. R. 360, this Court held that the determination of an appeal of right to enjoin picketing must be made in view of a Statute which took effect while the case was pending. To same effect: *Western Union Telegraph Co.* v. *International Brotherhood, etc.*, 133 F. 2d. 955, at 958 (c.c.a. 7, 1943).

**No Error Committed by the Court Below**

1. The Court below properly held that the alleged dispute over the time of delivery of bakery products was not a labor dispute within the Norris-LaGuardia Act. Paragraph 3 of the complaint filed in the District Court of the United States for the District of Columbia by respondent herein (cited by petitioners on page 3 of its petition for the writ of certiorari) shows on its face that it had been resolved prior to the instituting by the petitioners of the picketing and boycotting which were the subject of the complaint before the Trial Court. This fact must be taken as admitted by petitioners in view of its motion to dismiss the complaint, as was properly pointed out by the United States Court of Appeals for the District of Columbia, in its opinion (page 16 of the petition for the writ of certiorari).

2. Petitioners' contention that the dispute between the Union and respondent herein concerning an alleged underpayment of $12.20 by respondent on account of bakery products sold to him by a certain bakery amounted to a labor dispute is, to use the expression of the United States Court of Appeals, in its opinion rendered in this cause, ridiculous. Aside from the cogent and convincing arguments advanced by the Court of Appeals in support of its decision on this particular, it may be added that the conclusion of the United States Court of Appeals that this dispute is outside the definition of labor disputes and controversies within the meaning of the Norris-LaGuardia Act, is entirely supported by the decision of this Court in the case of *Columbia River Packers Association Inc.* v. *Hinton*, 315 U. S. 143, 86 L. Ed. 750 (1941). In that case this Court specifically stated "that a dispute among business men over the terms of a contract for the sale of fish is something different from a controversy concerning terms and conditions of employment, or concerning the association . . . of persons . . . seeking to arrange terms or conditions of employment calls for no extended discussion. The definition and stated public policy of the act . . . make it clear that the attention of Congress was focused upon disputes affecting the employer-employee relationship, and that the act was not intended to have application to disputes over the sale of commodities." Further, in view of the reliance which petitioners place upon the cases, *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 82 L. Ed. 1012, and *Milk Wagon Drivers Union* v. *Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63, it is appropriate to point out that these two last cited cases have been specifically distinguished by this Court from the facts in the case of *Columbia River Packers Association Inc.* v. *Hinton*, by the statement that in those cases "the employer-employee rela-

tionship was the matrix of the controversy." In the case at Bar, the money which was the subject of the dispute was not owed as wages but as the purchase price of merchandise; it was not owed to the Union (petitioners herein) but to their employer, an independent producer. Acting as volunteer collectors for the producer of the bakery products of his accounts, the dispute concerning the correctness of the amount tendered by the respondent cannot be treated as a labor dispute for the additional reason that, in this respect there was a combination between the Union with a non-labor individual within the analysis in the case of *U. S.* v. *Hutcheson*, 212 U. S. 219.

3. The dispute as to the alleged sale by respondent of a non-union product, should not be treated as a labor dispute within the meaning of the definition in the Norris-LaGuardia Act. There was nothing in the proceedings before the United States District Court for the District of Columbia to show that such a "dispute" was, in fact, existing; whether it was between employers and/or employees in the same industry, trade, craft, or occupation, or whether any such employees, including petitioners, had any direct or indirect interest therein. Irrespective of the argument hereinabove made that such a dispute cannot, now, be treated as a labor dispute under the new Labor Relations Act of 1947, it should be further emphasized that, assuming the factual existence of such a dispute, it was incidental to the main controversy between the parties herein concerning the $12.20 which petitioners claimed to be due to the producer of the bakery products. The case of *Converse* v. *Highway Construction Co.*, 107 F. 2d. 127 (C. C. A. 6, 1939) 127 A. L. R. 869, is quite analogous in this respect. To quote from that opinion: "In the case at Bar there was no real controversy between the debtor and its employees concerning terms and conditions of employment or concerning the association or rep-

resentation of persons in negotiating . . . terms or conditions of employment. . . . Wages and working conditions were incidental."

## Prayer

Wherefore, respondent prays that the petition for a Writ of Certiorari to issue from this Honorable Court for the purpose of reviewing the judgment of the United States Court of Appeals for the District of Columbia, entered in this cause April 28, 1947, be denied.

WILLIAM E. LEAHY,
*821 15th Street, N. W.,*
*Washington, D. C.;*
IRVING WILNER,
*315 Bond Building,*
*Washington, D. C.,*
*Counsel for Respondent.*